

DAVID FASKEN

IBLA 80-312

Decided June 26, 1980

Appeal from decision of the New Mexico State Office, Bureau of Land Management, declaring that oil and gas lease NM 33955 had terminated by operation of law for failure to pay annual rental in full in a timely manner.

Affirmed.

1. Oil and Gas Leases: Rentals -- Oil and Gas Leases:
Termination

An oil and gas lease on which there is no well capable of production terminates automatically by operation of law if the lessee pays only 50 percent of the annual rental due on or before the anniversary date of the lease, and where this deficient payment did not result from any incorrect information in a rental bill or decision.

2. Oil and Gas Leases: Rentals -- Oil and Gas Leases:
Termination

A delay by BLM in notifying an oil and gas lessee that his lease has terminated because he has failed to pay all of the rental due on or before the anniversary date of the lease does not extend the viability of the lease in order to allow him to pay the balance of the rental, as the lease had already terminated automatically by operation of law, without any administrative act, deed, or decision.

3. Oil and Gas Leases: Reinstatement -- Oil and Gas
Leases: Termination

The Department is without authority to reinstate an oil and gas lease terminated

automatically by operation of law for failure to pay annual rental timely where the lessee fails to submit the entire amount due within 20 days of the anniversary date of the lease, regardless of alleged extenuating circumstances which might otherwise constitute grounds for reinstatement.

APPEARANCES: Don M. Fedric, Esq., Roswell, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Effective September 1, 1978, the New Mexico State Office, Bureau of Land Management (BLM), issued oil and gas lease NM 33955 to Peggy E. Baetz for 1,280 acres of land. Baetz had filed a simultaneous noncompetitive oil and gas lease offer which was drawn with first priority and which was accepted by BLM. At the time of the issuance of the lease, the Geological Survey (GS) stated that the lands were not within a known geologic structure of a producing oil or gas field. Accordingly, the annual rental was set at \$1 per acre, pursuant to the provisions of 43 CFR 3103.3-2(a).

On January 19, 1979, GS advised BLM that the lands covered by this lease "are within an undefined addition which joins the South Salt Lake and Halfway Known Geologic Structures effective January 19, 1979." Accordingly, on February 8, 1979, BLM sent Baetz, the lessee, notice that the lands were included in a KGS and that the annual rental would now be \$2 per acre. The record shows that Baetz received this notice and did not appeal it.

On April 25, 1979, Baetz filed an assignment of all of her interest in this lease to David Fasken, excepting only an overriding royalty interest. Effective May 1, 1979, BLM approved this assignment.

On August 10, 1979, Fasken submitted a check for \$1,280 as his payment of the annual rental due on the lease, which represented \$1 per acre, instead of the \$2 per acre which was actually due. On August 23, 1979, BLM acknowledged its receipt of this payment, which receipt noted clearly that \$2,560 was due on or before the anniversary date of the lease, but that only \$1,280 had been paid. This receipt states: "Under payment of \$1280.00[.] Unless other action is pending or the balance is paid by the due date [(stated elsewhere therein as September 1, 1979)] this lease may be terminated." No further payments were tendered before this deadline.

On December 18, 1979, more than 3 months after the anniversary date, Fasken tendered an additional \$1,280 in an effort to pay the balance due on the annual rental. He pointed out that BLM had not yet taken any action to terminate the lease and requested that the lease be declared valid.

On December 20, 1979, BLM issued its decision declaring that the lease had terminated on September 4, 1979, the anniversary date and due date for annual rental, as extended owing to the Labor Day holiday, under the provisions of P. L. 555, 30 U.S.C. § 188 (1976), on account of Fasken's failure to pay the annual rental due on the lease by that time. On December 20, 1979, Fasken filed an affidavit of his agent setting out the details of his development of the lease and of the failure to submit the rental timely. He subsequently filed a notice of appeal of BLM's decision declaring that the lease had terminated. Appellant alleges that \$1,442,685.48 has been expended in drilling and completing an oil well on the lease. The well, however, was not capable of production on September 1, 1979.

[1] BLM correctly declared that appellant's lease had terminated on account of his failure to pay annual rental timely. An oil and gas lease on which there is no well capable of production terminates automatically by operation of law if the lessee does not pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976) 1/; 43 CFR 3103.3-2(d), 3108.2-1(a); Annie Mae Buckley, 44 IBLA 99 (1979); Eugene Jankoski, 43 IBLA 323 (1979); William A. Klug, 43 IBLA 255 (1979); James Kordosky, 43 IBLA 63 (1979); and cases cited therein. The annual rental for lands within a known geologic structure of a producing oil or gas field (KGS) is \$2 per acre. 43 CFR 3103.3-2(b)(1). Appellant's predecessor in interest in the lease was advised explicitly that the lands within the lease were on a KGS, and no appeal of this decision was taken. Thus, appellant, as the lessee of record, was obliged to pay \$2 per acre for these KGS lands, or \$2,560, on or before September 4, 1979, the anniversary date of the lease as extended here because of the closing of the BLM offices for the 1979 Labor Day holiday, failing which his lease would terminate automatically by operation of law.

1/ This section provides as follows:

"[U]pon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: Provided, however, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made: Provided, That if the rental payment due under a lease is paid on or before the anniversary date but either (1) the amount of the payment has been or is hereafter deficient and the deficiency is nominal, as determined by the Secretary by regulation, or (2) the payment was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with a bill or decision which has been rendered by him and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless (1) a new lease had been issued prior to May 12, 1970, or (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary."

Appellant failed to pay the full amount of annual rental due on or before September 4, 1979. Therefore, under the mandatory provisions of the mineral leasing statute, *supra*, his lease terminated automatically as of the closing of BLM's office on September 4, 1979.

Appellant does not fall within the exceptions to this rule stated at 43 CFR 3108.2-1(b), 2/ which excuse deficiencies in timely payments where they are "nominal" (not more than the greater of 5 percent of the amount due or \$10) or where they resulted from reliance on incorrect figures in the lease, in a decision, or in a rental bill. Appellant's timely payment on August 10, 1979, was deficient by 50 percent and so does not fit the definition of a "nominal" deficiency. Further, appellant and his predecessor were never misinformed as to the amount due; to the contrary, appellant was expressly advised by BLM that the August 10 payment was short in time to correct his error. Thus these exceptions do not apply.

Moreover, appellant acknowledges that at the time of his acquisition of the lease a privately prepared lease abstract showed the rental to be \$2,560 per annum. Therefore, he had actual notice of the amount due before the default, as well as actual notice from BLM that the payment was deficient.

[2] BLM's delay in notifying appellant of the termination of his lease did not, as he suggests, extend its viability in order to allow him to pay the balance of the annual rental. By the express terms of the statute, termination of a lease for failure to pay annual rental on or before the anniversary date is automatic and occurs without any administrative act, deed, or decision of any Departmental employee. 30 U.S.C. § 188(c) (1976)

2/ This section provides as follows:

"Exceptions. If the rental payment due under a lease is paid on or before its anniversary date but either the amount of the payment has been or is hereafter deficient and the deficiency is nominal as defined in this section, or the amount of payment made was determined in accordance with the rental or acreage figure stated in the lease or stated in a bill or decision rendered by an authorized officer and such figure is found to be in error resulting in a deficiency, such lease shall not have automatically terminated unless (1) a new lease had been issued prior to May 12, 1970, (2) the lessee fails to pay the deficiency within the period prescribed in the Notice of Deficiency provided for in this section. A deficiency will be considered nominal if it is not more than \$10 or five per centum (5 percent) of the total payment due, whichever is more. The authorized officer will send a Notice of Deficiency to the lessee on a form approved by the Director. The notice will be sent by certified mail, return receipt requested, and will allow the lessee 15 days from the date of receipt or until the due date, whichever is later, to submit the full balance due to the appropriate office. If the payment called for in the notice is not paid within the time allowed, the lease will have terminated by operation of law as of its anniversary date."

[3] Appellant asserts that his failure to pay annual rental timely was excusable. However, these facts, even if true, are irrelevant. While leases terminated by operation of law for failure to pay annual rental timely may be reinstated where the failure was justifiable or not due to lack of reasonable diligence on the part of the lessee, appellant has never filed a petition for reinstatement. Nor would he be entitled to reinstatement in any event, as, by the express terms of the controlling statute, 30 U.S.C. § 188(c) (1976), 3/ the Department has the authority to reinstate a lease terminated automatically by operation of law only where the full amount of the rental due is paid or tendered within 20 days after the anniversary date. 43 CFR 3108.2-1(c): Kenneth Tweten, 47 IBLA 180 (1980); Alice M. Conte, 46 IBLA 312 (1980); Sigmund Matejko, 43 IBLA 96 (1979); Beatrice Wood, 42 IBLA 148 (1979); John A. Steele, Jr., 41 IBLA 4 (1979); Apostolos Paliombeis, 30 IBLA 153 (1977); and cases cited therein. Such was not the case here, as appellant did not submit the entire amount of the rental due until December 18, 1979, more than 3 months after the anniversary date, and the lease therefore cannot be reinstated under any authority of existing law. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge

3/ This section provides as follows:

"Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if [other conditions specified]." (Emphasis supplied.)

4/ We have been advised that this lease is the subject of pending special relief legislation, and that the Assistant Secretary supervising BLM has directed that this parcel not be offered for lease until this matter is resolved.

